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No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., PETITIONERS

v.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

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Opinion Below

The opinion of the United States Court of Appeals (R. 20-37) is reported at 153 F. (2d) 785. No opinion was rendered in the United States District Court for the District of Columbia.

Questions Presented

1. Whether the District Court had jurisdiction to review the action of the Board of Governors of the Federal Reserve System in removing respondents as directors when

it is charged that the Board in so doing has exceeded the statutory authority conferred upon it.

2. Whether the Board exceeded its authority in holding that respondents were employed by a firm "primarily engaged" in the underwriting business, within the meaning of Section 32 of the Banking Act of 1933, as amended. (12 U. S. C. § 78).

Statutes Involved

Section 30 of the Banking Act of 1933, c. 89, 48 Stat. 162, 193, as amended (12 U. S. C. § 77), provides as follows:

> Sec. 30. Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in con-

ducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided,* That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

Section 32, as amended (12 U. S. C. § 78), provides:

Sec. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment polices of such member bank or the advice it gives its customers regarding investments.

Statement

On March 23, 1945, the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) issued an order removing respondents as directors of The Paterson National Bank, Paterson, New Jersey (hereinafter referred to as the Bank) (R. 6-7). The order was issued pursuant to authority conferred upon the Board by Section 30 of the Banking Act of 1933, 48 Stat. 193 (12 U. S. C. § 77), which provides, *inter alia*, that if, following a hearing, the Board finds that an officer or director of a national bank has continued to engage in unsafe or unsound practices or to violate any law relating to such bank after having been warned by the Comptroller of the Currency to discontinue such practice or violation, the Board in its discretion may order that such officer or director be removed from office. The finding upon which the Board's order in this case was made was that respondents had continued to violate Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78), after having been warned by the Comptroller of the Currency to discontinue such violation (R. 7-14).

Section 32 prohibits any officer, director or employee of any company, partnership or individual "primarily engaged" in the "underwriting" business from serving at the same time as an officer, director or employee of a national bank.

There are no disputed questions of fact.

Respondents were and are employees of Eastman Dillon & Co., a brokerage and securities house, having its principal place of business in New York City (herein sometimes called the Company). This firm, it was charged, was "*primarily engaged*" in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or

through syndicate participation, of stocks, bonds or other similar securities * * *".

It was not contended by petitioners or anyone else that the respondent directors had not performed their duties faithfully, nor could it have been. It was not contended that they had been guilty of any act which caused loss to the bank or its stockholders. It was not contended that they have used their position as directors for any ulterior or selfish purposes. Their removal revolves around the bald question of whether they were employees of a partnership *"primarily engaged"* in the "issue, flotation, under writing, public sale or distribution of stocks, bonds or similar securities."

The Board thereupon rendered its opinion (R. 8) wherein it stated: That there was no dispute as to the essential facts; that respondent Fayerweather had been a director of the bank since January 13, 1925, while respondent Agnew had been a director since November 27, 1934; that both respondents were elected directors at annual meetings of the shareholders of the bank held on January 13, 1942, January 12, 1943 and January 11, 1944, and that following these elections they took the appropriate director's oaths which were filed in the office of the Comptroller of the Currency.

The opinion and findings further showed that the total holdings of stock of the bank by the respondents and their families was approximately 1000 out of the total of 12,000 shares; that Mr. Fayerweather had been in the brokerage and securities business since about 1920, and that both he and Mr. Agnew had been employed by the firm of Eastman, Dillon & Co. since March, 1941, and were then employed at the office of that company in Paterson, New Jersey; that Eastman, Dillon & Co. then did no business with the bank and had not done any since the fall of 1941 when the bank disposed of all of its bonds other than United States govern-

ment bonds; that Eastman, Dillon & Co. does not deal in United States government bonds; and that since October, 1941, respondents have done no business with the bank other than a strictly brokerage commission business with its customers.

The company advertises its business as "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." For the fiscal year 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities) amounted to 26 per cent of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42 per cent of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32 per cent of its gross income from all sources; and its gross income from the brokerage business amounted to 47 per cent of its gross income from all sources. Considering the market value of the securities which were bought and sold by the firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within the "underwriting field" would represent about 15 per cent of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in the "underwriting field" would amount to a similar percentage (15 per cent) of the total number. During the year 1943, the firm ranked ninth among 94 leading investment bankers of the country with respect to its total participations in underwritings of bonds. Excluding municipal and railroad bonds, its participations in under-

writings during 1943 amounted to $14,657,000. For a period during 1943 it ranked first among the underwriters.

Upon the basis of the foregoing findings of fact, the Board reached the "Conclusions of Law" that (R. 12-13):

> "The *only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co. was, at the times stated in the certificate of* the Comptroller of the Currency, '*primarily engaged* in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities' within the meaning of § 32 of the Act."

The Board concluded that Eastman, Dillon & Co. was primarily engaged in underwriting.

Respondents then sought from the District Court a writ of certiorari to the Board or in the alternative a mandatory injunction seeking to have the alleged illegal and unwarranted action of the Board set aside. The District Court dismissed the action, without opinion (R. 18-19). The United States Court of Appeals for the District of Columbia (hereinafter called the Court of Appeals) reversed, one judge dissenting. (R. 20-27).

Summary of Argument

I

This Court has repeatedly held that the courts have jurisdiction to review actions of administrative authorities where it is charged that the agency is acting in excess of its power—that it has not properly determined the extent of the authority given it by Congress. *Cf. Philadelphia* v. *Stimson*, 223 U. S. 605; *Ickes* v. *Fox*, 300 U. S. 82; *Noble* v. *Union River Logging R. R.*, 147 U. S. 172; *Garfield* v. *United States*, 211 U. S. 249.

The doctrine of *Stark* v. *Wickard*, 321 U. S. 288, rather than *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, is applicable here, especially as in the present case violation of the administrative order would subject the respondents to severe criminal penalties. *Cf. Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344; *Ex parte Young*, 209 U. S. 123; *Estep* v. *United States*, 327 U. S. 114; *Viereck* v. *United States*, 318 U. S. 236.

The right involved need not be of statutory origin, *Cf. Columbia Broadcasting System* v. *United States*, 316 U. S. 407; it may be a common law right and the right to serve as a director, except as prohibited by the banking laws, is a common law right.

The National Banking System is not a more complete system or a more essential part of government than the administration of the Postal System, yet the Postmaster General may be enjoined if he acts beyond his authority. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. An agency may not properly interpret its own grant of power. This is a judicial function. *Addison* v. *Holly Hill Products*, 322 U. S. 607; *Social Security Board* v. *Nierotko*, 90 L. Ed. 594 (Adv. sheets).

If no relief in equity may be had certiorari should lie to review the action of the Board because it is (a) beyond its powers; (b) final; and (c) not reviewable otherwise. *Degge* v. *Hitchcock*, 229 U. S. 162.

II

The words of the statute "primarily engaged in underwriting" must be interpreted according to their ordinary meaning, unless such interpretation leads to absurd consequences or is plainly at variance with the policy of the legislation as a whole. *Cf. Addison* v. *Holly Hill Products*, 322

U. S. 607. The ordinary meaning of the words "primarily engaged" is definitely quantitative and mean "first". By no quantitative test shown in this record can the underwriting business be held to be first. The Board's effort to do this is by transposing the words of the statute "primarily engaged" to "primary" and then by adding to the word "primary" the phrase "one of the primary activities". This it may not do. The interpretation put by the court below upon the words "primarily engaged" are neither absurd nor are they plainly at variance with the purposes of the statute as a whole. On the contrary, they are in harmony with it.

III

Unless the words "primarily engaged" do not mean "first" in a quantitative sense, the Act constitutes an unlawful delegation of authority in that it furnishes no intelligible principle upon which the Board may act. *Cf. Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

ARGUMENT

I

The District Court had jurisdiction to review the action of the Board of Governors of the Federal Reserve System in removing respondents as directors when it is charged that the Board in so doing has exceeded the statutory authority conferred upon it.

A

This Court has so often said that the courts have jurisdiction: where "an officer, insisting that he has warrant under a statute, is transcending its bounds," (*Philadelphia* v. *Stimson*, 223 U. S. 605); where "the complainant did not ask the Court to interfere with the official

discretion of the Secretary * * *, but challenged his authority to do the things of which complaint was made." *Ickes* v. *Fox*, 300 U. S. 82 (at p. 97); where "If he (Secretary of Interior) has no power at all to do the act complained of, he is as much subject to injunction as he would be to a mandamus, if he refused to do an act which the law plainly required him to do; (*Noble* v. *Union River Logging R. R.*, 147 U. S. 172); that it seems unnecessary to multiply examples, though it might be well to recall the stirring words in *Garfield* v. *United States*, 211 U. S. 249, 262; that:

> "* * * there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

The right to this review would seem to be clearly within the above doctrine so often stated by the Court and recently repeated in *Stark* v. *Wickard*, 321 U. S. 288, 309-10, where the Court said:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

Stark v. *Wickard, supra,* was a suit for injunction, filed in the District Court of the United States for the District of Columbia, against the Secretary of Agriculture. Plaintiffs were producers of milk. Plaintiffs complained that the Secretary, purporting to act under the Agricultural Marketing Act of 1937, had prescribed minimum prices to be paid to milk producers (plaintiff among them) from which he had deducted a specific amount for the benefit of milk co-operatives. Plaintiffs contended this was an interpretation that carried the Secretary's act beyond his statutory power.

The two lower courts held that the order was not reviewable on the ground that plaintiffs had no legally protected right entitling them to sue. This Court reversed this holding and in so doing showed the distinction between it and the *Switchmen's* case (*Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297) so strongly relied upon by petitioners. The Court considered that the producers had "a personal claim" which gave them standing to complain, while in the *Switchmen's* case "no personal right of employees, enforcible in the courts, was created."

The "rights" in *Stark* v. *Wickard* were those created by the statute. However, the right involved need not be of statutory origin. It may be a common law right. Cf. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407. The right to serve as a director—except as *prohibited* by the banking laws, is a common law right. There could scarcely be a claim that Agnew and Fayerweather did not possess "personal rights" in the case.

The brief of the Board goes to great length to show that the banking system is "itself a complete system for the establishment and government of national banks",—

and "that no judicial review is provided by the statutes."[1] From this premise the deduction is apparently sought that its administrators are in effect "beyond the law" and that even if they "run wild" they may not be called to book, unless they are charged with fraud. The assertion logically leads to the proposition that they may (purporting to act under § 32) remove a director for any reason, and that their action in so doing could not be inquired into or restrained by any court. This is not and never has been the law.

So far as the "completeness" of the National Banking System is concerned, it surely could not be contended that the banking system is a more complete system or a more essential part of the government than the administration of post offices and post roads. Obviously it is even less so, for private capital and private endeavor are employed in the banking system, while the postal system is solely governmental. Yet the Postmaster General, if he assumes to act beyond the authority of the statute upon which he bases his act, may be enjoined from such illegal act. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

Adams v. *Nagle*, 303 U. S. 532, as pointed out by the court below (R. 25), has little similarity with the case before the Court. There the opinion dealt with the power of the Comptroller of the Currency to determine the sufficiency of assets upon which to base an assessment. It was claimed

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[1] The statute in *Stark* v. *Wickard* made no provision for judicial review, but this Court said that even though there was

> "• • • no direct judicial review granted by this statute for these proceedings. • • • The authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents. • • • it was not to be lightly assumed that the silence of the statute bars from courts an otherwise justiciable issue."

that in so doing he had made a mistake of law in the interpretation of a contract. There was no question as to the scope of his authority, or of the interpretation of his statutory authority. As the Court of Appeals said none of the circumstances or considerations involved in that case are present here. Moreover, in the present case violation of the administrative order would subject the respondents to severe criminal penalties. Cf. *Ex parte Young* 209 U. S. 123, 159. *Estep* v. *United States*, 327 U. S. 114.

The construction of the statute, for violation of which the Board is authorized to remove from office the director of a bank, is essentially a question of law. In fact, petitioners concede that "the issue here is one of law." As pointed out by the Court of Appeals "in matters of law, unmixed, reviewing courts are free to substitute their own judgment for that of the administrator, although great weight must be given to administrative decisions." (R. 25)

We are not here concerned with judicial review of a finding or discretionary order of an administrative agency, as in *Adams* v. *Nagle*, but simply whether that agency is acting within the scope of the power granted by the statute. If it is acting *beyond* the authority granted then its action is illegal and the rights which are taken away are in violation of the citizens Constitutional privileges and immunities, and it may be restrained.

The real question presented by the case is, has the agency properly interpreted its own grant of power, and this court said in *Addison* v. *Holly Hill Products*, 322 U. S. 607:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

And again in *Social Security Board* v. *Nierotko*, 90 L. Ed. (Adv. Sheets) 594, 601:

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

B

If petitioners are correct in their assertion that even though the Board's action is beyond its statutory authority and that such action may not be corrected in a court of equity by granting appropriate relief, then a situation would be presented where issuance of a writ of certiorari to the Board would appear to be approprate. *Degge* v. *Hitchcock*, 229 U. S. 162;

Unquestionably the *Degge* case denies the right to the writ where it is sought merely to "review" an administrative order, but in a case where it is claimed that there has been a "ruling in excess of statutory power," and "there is no relief to be granted otherwise," the writ would seem appropriate.

First the opinion says:

> "Not being a judgment, in the sense of a final adjudication, the plaintiffs in error were not concluded by his decision, for had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. *American School* v. *McAnnulty*, 187 U. S. 94. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620.
>
> "*The fact that there was this remedy* is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice." (Italics supplied)

Then the opinion proceeds to leave the door open on the applicability of the writ in an appropriate case for the court concludes the opinion by saying:

> "The writ of certiorari is one of the extraordinary remedies and being such it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. *Public Clearing House* v. *Coyne*, 194 U. S. 497. This cannot be done."

From the court's language, it is seen that the writ is proper only where the "inferior tribunal has acted without jurisdiction or in disregard of the statutory provisions," and in such cases the writ runs "to boards, officers, tribunals and inferior judicatures whose findings and decisions, even though erroneous, have the quality of a final judgment; and there being no right of appeal or other method of review, the extraordinary writ of certiorari *was resorted to from necessity to afford a remedy where there would otherwise have been a denial of justice.*"

There can be no question that the opinion and order of the Board on removing respondents as directors was in a *quasi-judicial* proceeding and was final.

Respondents therefore assert that if no relief in equity may be had, certiorari should lie to review the action of the Board because it is (a) *beyond its powers;* (b) *final*, and (c) *not reviewable otherwise.* The foregoing circumstances *concurring*, the issuance of the writ would seem to be authorized under the authority of *Degge* v. *Hitchcock*, *supra.*

II

The Board exceeded its authority in holding that respondents were employed by a firm "primarily engaged" in the underwriting business, within the meaning of Section 32 of the Banking Act of 1933, as amended.[2]

The answer to the question depends upon the proper interpretation of the Statute to see *what power* Congress conferred on the Board. Manifestly the power to remove directors was not given "at will" but *only* if certain circumstances were found to be present, namely, that the directors be *"primarily engaged"* (or employees of a firm "primarily engaged") in the underwriting and sale of securities.

The rule is familiar that "words in a statute are to be given their *ordinary meaning,*" (unless such interpretation leads to "absurd consequences" or is "plainly at variance with the policy of the legislation as a whole," both of which aspects are considered hereinafter). As this court said in *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607,

> "* * * After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

There can scarcely be any sound dispute as to the *"ordinary meaning"* of the words "primarily engaged."[3] They are, we submit, definitely quantitative and mean "first", and by no quantitative test shown in the record can the underwriting business of respondents—employees of Eastman, Dillon & Co.—be held to be first. In volume, in

[2] 12 U. S. C. § 78.

income and in the number of transactions that firm's business was overwhelmingly brokerage.

The Board completely distorts the ordinary meaning of the words of the statute in order to achieve a result it wishes. It does this by transposing the words of the statute "primarily engaged" to "primary" and then by adding to the word "primary" the following: "*One of the primary activities*" (R. 13) (*Petitioner's brief*, 77, 84, 86).

This we must insist the Board may not do. This Court has said in *Viereck* v. *United States*, 318 U. S. 236, 241, 243, 244—a case arising under the statute requiring registration in the State Department of agents for foreign governments—that

> "• • • penal sanctions attach here[4] for wilful failure to file a statement • • •. Unless the statute, fairly read, demands the disclosure of the information

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[3] The only definition of "primarily" given in dictionaries for "ordinary" use (e. g. Winston's Pocket Dictionary, 1941 ed. p. 307) is "in the first place". The word "primary" has only one legal definition. In Bouvier's Law Dictionary it is defined as "that which is first or principal"; in Black's "first", "chief", "principal", "leading"; in Rapalje & Lawrence's "first", "chief", "leading".

The very first definition of the word "primary" in Webster's International is "in the first place". As we all know "primary" is derived from the Latin "primus" meaning first. Numerous words derived from the root "primus" mean essentially *first* in their respective class, such as "primate"—first minister (a cleric), "prime minister"—first minister (civic head), "primer"—first reader, "primogeniture"—first born. "Primarily" is of course used in contradistinction to secondarily. There cannot be two "firsts". One can say "I read the first two pages of a book," but one cannot say "I read the two first pages."

[4] (a) Penal sanctions likewise attach in the instant case. § 30 provides:

"• • • Any such director • • • removed from office • • • who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or *both*, in the discretion of the court."

(b) Cf. *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344, 353.

which petitioner failed to give, he cannot be subjected to the statutory penalties."

* * * * * * *

"* * * In neither case does the statute command, or authorize the Secretary to command, registrants to make any statement of their activities other than those in which they have engaged 'as agent'.

We cannot read that phrase as though it had been written 'while an agent' or 'who is an agent'. The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem.

* * * While Congress undoubtedly had *a general purpose to regulate agents* of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely *because we think they might more successfully have effectuated that purpose.*" (Italics supplied.)

Analysis of the language of the statute and disclosure of the Board's fallacy in arriving at its "conclusion of law" are splendidly stated in the opinion of the court below (R. 26-27):

> "The Board says that the phrase "primarily engaged" has two possible meanings. Its premise is that the word "primary" has two possible meanings, one being a quantitative meaning and the other the meaning which the word has in expressions such as "the primary colors," "one of the primary planets," "the primary causes of war," and "a matter of primary importance." It says that the latter meaning accords with the legislative intent and, further, that the former leads to absurd results. It, therefore, adopts the latter meaning and concludes that, as a

matter of law, Eastman, Dillon & Co. was primarily engaged in underwriting within the meaning of the statute.

It is true that the adjective "primary" has different shades of meaning, but always its basic idea is "first". It may refer to the first in order of time, and thus mean original or initial; or in order of importance, and thus mean chief or principal; or in order of derivation, and thus mean fundamental. Its synonyms are "prime" and "primeval". Its antonyms are "secondary" and "lesser". The difference which the Board senses, but does not state, is that "primary" is not restricted to the singular; it may refer to a plural. Thus, the primary colors are not one but several; and so with the planets and the causes of war. An activity may be either *a* primary activity or *the* primary activity of a given person. The adverb "primarily" has similar shades of meaning. The Board's interpretation is, in effect, that "primarily engaged" as it occurs in this statute encompasses all the important activities of a concern; that it means "a" primary activity, not merely "the" primary activity.

But "primary" when applied to a single subject always means first, or chief, or principal. A concern's "primary activity" is never one of several; it is always the first, or chief, or principal, activity. And so it is with "primarily". When applied to a single activity, as it is to underwriting in the case at bar, it always means the first, or chief, or principal, activity. One would never say that a person is "primarily concerned" or "primarily interested" or "primarily engaged" in a specified single activity, if the idea sought to be conveyed was that the named activity was a lesser among several important activities. To say that such an expression conveys that idea is, we think, clearly erroneous.

In its brief, the Board epitomizes its position by saying, "Undoubtedly, then, Eastman, Dillon & Co. are 'fundamentally' or 'primarily' engaged in both the brokerage business and the underwriting business. To put it otherwise, underwriting is one of the busi-

nesses in which the firm is 'primarily' engaged." The latter sentence makes plain the error of law of the Board. It is true that the word "primary" may be applied to a plurality of items in order to distinguish that group from still others as secondary. But this does not answer the question which is posed by the statute. That problem is to ascertain whether the designated concern is primarily engaged in a single, named activity, *i.e.*, underwriting. That problem is not solved by finding that the concern is primarily engaged in a group of several activities, in contradistinction to still other lesser activities, and then concluding that the concern is primarily engaged in each separate activity in the first group. That process would lead to the conclusion that an activity which, standing by itself is by every standard less than another, is, nevertheless, primary. Such a conclusion is simply not true. The activity in which the concern is in fact secondarily engaged cannot be made its primary engagement by a process of reasoning which includes a fallacy of division".

(a) *Ordinary meaning not plainly at variance with the statute as a whole.*

Nothing in the legislative history of the act either requires or justifies a different construction, particularly a construction which would leave vague and indeterminate the extent of the activity which would render the director ineligible and subject him to severe criminal penalties if he should disregard the administrative order.[5]

As pointed out in the opinion below, and as appears from their brief, petitioners purport to derive comfort for their position from the provisions of the banking act relating to the separation of "affiliates" from "member banks", *Sec-*

[5] The statute whether it be regarded as "penal" as respondents have contended, or "remedial" as petitioners insist it is, should be *fairly* construed. Cf. *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344, 353.

tion 20—(48 Stat. 188, 12 U. S. C. A. § 377)[6] and *Section 21* (48 Stat. 189, 12 U. S. C. A. § 378)[7] of the Banking Act and the Senate Committee Report upon the bill which became the Banking Act of 1933. (*Sen. Rep. No. 77, 73rd Congress*, 1st Session, 1933).

The Board relied upon the phrase in the report "to separate as far as possible * * * member banks from affiliates of all kinds."

But "affiliates" had been defined by the bill. In substance an "affiliate" was a corporation in which the member bank held *a majority* of the shares voted for the election of directors; or of which control is held by shareholders of a member bank who own or control either a majority of the shares of the bank or *more than 50 per cent* of the shares voted for the election of directors.[8]

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[6] "SEC. 20. After one year from the date of the enactment of this Act, no member bank shall be affiliated in any manner described in section 2 (b) hereof with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stock, bonds, debentures, notes, or other securities: *Provided*, That nothing in this paragraph shall apply to any such organization which shall have been placed in formal liquidation and which shall transact no business except such as may be incidental to the liquidation of its affairs."

[7] A related section to Section 20 was Section 21 (12 U. S. C. A. § 378) which provided that after one year it should be unlawful for any organization "engaged in the business of * * * underwriting * * * to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor."

[8] 48 Stat. 162, 12 U. S. C. A. § 221a. The Act said:

"As used in this chapter—

"* * *

"(b) Except where otherwise specifically provided, the term 'affiliate' shall include any corporation, business trust, association, or other similar organization—

"(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors,

The suggestion had been made, so the Report said, that the affiliate system be "abolished". The Committee, however, did not deem it advisable to take this step. Congress decided upon a qualified prohibition.

The separation of affiliates from banks was thus a very qualified one—and one depending upon a distinctly *quantitative test.*

As to the Board's contention with respect to the influence of Sections 20 and 21, the Court below said:

> "One of the principal sections designed to attain these purposes is section 20 of the Act, which provides that no member bank shall be affiliated 'in any manner' with any company 'engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.'"

But the Act does not read as the Board quotes it. It does not say "that no member bank shall be affiliated 'in any manner' with any company," etc. It says, "no member bank shall be affiliated in any manner *described in subsection (b) of section 221a of this title* with any corporation," etc. (Italics supplied.) The subsection mentioned is the definition of affiliates which we have just discussed. Thus, Section 20, in full text, prescribes dissolution of control only,

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trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

"(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

"(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank."

and not the complete divorcement indicated by the partial quotation relied on by the Board. There is a vast difference.

Thus, it is plain that the Committee Report and the section of the Act from which the Board says we must derive the intent of Congress, do not prescribe the complete divorcement which the Board urges, but, quite the contrary, direct only a dissolution of control. In each provision of the definition of the prohibited affiliation, the line is drawn at the majority. Forty-nine per cent is permissible. Fifty-one per cent is prohibited. This is a quantitative test. If, as the Board says, we are to ascertain the intent of Congress by these references, we reach the clear conclusion that Congress intended to apply a quantitative test in its prohibition.

As to Section 21 of the Act, the Board says, in its brief in this Court:

> "Section 21 is complementary to section 20 and, among other things, prohibits any company which is engaged in the underwriting business from engaging 'at the same time to any extent whatever in the business of receiving deposits . . .'"

This section of the Act, prohibiting dealers in securities from engaging in the banking business, contains two expressions pertinent to the present inquiry. Congress here used the phrase "engaged in the business"—not "primarily engaged," or "principally engaged," but simply "engaged". It added the emphatic phrase "to any extent whatever". These words prescribe complete separation. When Congress meant complete separation, it said so, in this same Act, in unmistakable terms. It knew what terms to use, and used them.

We do not know why Congress, in separating member banks from outside interests, went only so far as to prohibit control. We do not know why it rested its prohibition upon the precise line of majority. We only know that it did so.

And the fact that it did so seems to indicate that when it used the term "primarily engaged" in Section 32 of the Act, as contrasted with "engaged" and "engage at the same time to any extent whatever" in Section 21, it had in mind a chief or principal business as measured by a quantitative test.

When Section 32 was originally enacted in 1933 there was no attempt to follow the wording of Section 20 (*engaged principally* in the issue, flotation, underwriting, public sale, etc.) or of Section 21 (*engaged* in the business • • • of underwriting, etc.). The language of Section 32 originally was "*engaged primarily* in the business of purchasing, selling or negotiating securities".

Under the original act directors might serve only if permitted to do so by the Board by permit in the particular case.

In 1935 Congress amended § 32 in several respects: (1) It did away with the exceptions by permit in particular cases and substituted the provision that the Board might allow such service "by general regulations"; (2) It expanded the provisions to include "employees" as well as officers and directors so as to include individuals engaged in the securities business, and (3) it changed the wording to phraseology similar to that found in Section 20 descriptive of investment banking—that is similar in all respects save the very important one that it again used the term "*primarily*" instead of "principally". This would seem to show that Congress had no intention of disqualifying as an officer, director or employee of a member bank any one who is interested in some similar capacity in another business so conducted that the underwriting or securities business that it did was subordinate or incidental to its main activity, whether such main activity be brokerage, insurance or any other business.

The Board's brief says (p. 39) the Board's interpretation provides a "much more stable and less variable formula" that that adopted by the Court below. Respondents insist the situation is just the reverse. Can anyone reading the Board's several rulings set forth in its appendix have the faintest idea in the world of *how much* investment security activity would be subject to condemnation? The only invariable deduction one can make is that if the director does any securities business *at all*—he will receive the Board's condemnation. On the other hand, under the Court's interpretation he would know, as a mathematical certainty, when his activity violated the statutory prohibition.

The words used in the statute simply do not "produce an unreasonable result", "plainly at variance with the policy of the legislation as a whole".

(b) *Plain meaning does not lead to absurd consequences.*

The Board says that when the plain meaning of a statute produces absurd results or is plainly contrary to the policy of the legislation as a whole, an interpretation at variance with the plain meaning is permissible.

This is, of course, true, but there must be *real* "absurdity" and not merely an imagined "absurdity"—real "conflict" with the purposes of the statute and not a fanciful conflict. The absurdity may not consist merely in a viewpoint at variance with petitioners' own idea of what it would like to have the statute mean, or even what it believes would be best for the administration of the act. Where is any absurd result in the instant situation? There is nothing absurd in providing that a director may not serve if his underwriting business is more than 50 per cent of his other business. Not *all* directors selling securities were to be put under the ban, but only those "primarily engaged, etc." Why shouldn't Congress have provided

a definite and mathematical yardstick by which the underwriting activity, fraught with important consequences, should be measured?[9] Congress might well have and no doubt did consider that to deprive the bank of the benefit of *all* counsel and advice from experienced and well qualified brokers and investment bankers on their boards was undesirable—and hence fixed the standard which it did—that they must be *primarily engaged* in the underwriting field. In any event, if Congress had wished to make *all* engagements in business of buying, selling or negotiating securities, or even those whose underwriting activities which though secondary were important, a bar to serving on a bank directorate, it surely would have had little difficulty in saying so—and with equal certainty would not have used the words it did. When Congress, in this same banking act, wished to prescribe complete separation, it had no difficulty in expressing its will.

Does not this seem far less "absurd" than the position of the Board—that under the phrase "primarily engaged" it may find that underwriting to any degree from zero to fifty per cent constitutes a violation of the statute? Is this not the sort of "roving commission" that Mr. Justice Roberts condemned in his concurring opinion in the *Holly Hill* case (*supra*)? Yet the Board has gone so far as to indicate that if a broker did *any* underwriting he would be ineligible for a directorship,[10] and has said that under § 32

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[9] The desirability of a fixed yardstick in connection with a "holding company affiliate" was appreciated by the Board—for in its 1943 Annual Report to the Speaker of the House of Representatives it used this language (p. 35):

> "Moreover, regulation, to be effective, must have continuity, and a statutory yardstick under which a company may be a bank holding company one year and may not be the next year renders regulation difficult if not impossible in some important instances."

[10] See Regulation R—*Board of Governors of the Federal Reserve System*—Appendix "A", (post, p. 30).

"*all* relationship between member banks and 'dealers in securities' should be terminated." (Petitioner's Brief—Appendix 65, 71, 80).

Congress certainly never indicated any such viewpoint and quite definitely had in mind a *degree* of activity which would bring the director within the ban of the statute. This is clearly and necessarily quantitative. He could be removed *if* engaged in underwriting to a certain extent. To what extent? Primarily—first.—And the underwriting business of Eastman, Dillon & Co. was not first.

(c) *Interpretation by the Board as shown in Petitioners' Appendix to Brief.*

The appendix to the Board's brief consisting of numerous rulings from July, 1934 to November 30, 1944, is quite illuminating. These letters demonstrate the wholly arbitrary and unreasonable interpretation by the Board of its own powers.

A construction locked within the Board's breast unknown to Congress, to the Courts, to the People, can hardly serve as a basis for a contention that it is a "settled rule" of interpretation long "acquiesced in"—and hence entitled to respect on that account.

Respondents do not dispute the fact that the opinion of the Board is entitled to great respect and such respect and consideration were given by the Court below, but as pointed out by this Court in *Skidmore* v. *Swift*, 323 U. S. 134, 140 (cited by petitioners upon this point):

> "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, *the validity of its reasoning*, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Surely there is nothing in the reasoning displayed in this correspondence (Petitioners' Appendix) calculated to persuade one of the soundness of the Board's position. Rather, it is a striking example of autocratic attitude and bureaucratic power. The Board seems determined to "carry its point"—viz—that it has the right to prohibit the director from serving if he engages in the sale of *any* stocks, bonds or similar securities except United States Government obligations.

Did Congress mean to grant to the Board any such *power? We submit the answer is no.*

III

Unlawful Delegation

If the words "primarily engaged" do not mean *"first"* in a quantitative sense, as contended by respondents, the act constitutes an unlawful delegation of authority in that it furnishes no intelligible principle upon which the Board may act. There are no standards—there is no yardstick.

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 421. (1935).

As Mr. Justice Roberts said in his separate concurring opinion in the *Holly Hill* case (*supra*):

> "If Congress, when it said that the area of production should be defined by the Administrator, meant that that official should have a roving commission to create exemptions from the act, the entire provision must fall as an unconstitutional attempt to delegate legislative power."

And as a practical matter the Board itself has not applied any yardstick. (See Appendix to Petitioner's brief).

Conclusion

For reasons herein stated and those stated in the opinion of the Court below it is respectfully submitted that the judgment of the Court below should be affirmed.

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APPENDIX A

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Relationships With Dealers in Securities under Section 32 of the Banking Act of 1933

Regulation R

This regulation as printed herewith is in the form as revised effective January 4, 1936

Inquiries Regarding This Regulation

Any inquiry relating to this regulation should be addressed to the Federal Reserve Agent at the Federal Reserve bank of the district in which the inquiry arises.

(Superseding Regulation R of 1933)

Statutory Provisions

This regulation is based upon and issued pursuant to the provisions of section 32 of the Banking Act of 1933, which is published in the Appendix hereto.

Section 1. Prohibitions

Under section 32 of the Banking Act of 1933, except as hereinafter stated in section 2, no officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, can legally be at the same time an officer, director, or employee of any member bank of the Federal Reserve System.[2]

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[2] Therefore, by its terms, section 32 does not apply—

(a) To a person who is not an officer, director, or employee of a member bank of the Federal Reserve System;

(b) To a person (1) who is not an officer, director, or employee of a corporation or unincorporated association primarily engaged in the issue,

Section 2. Exceptions

Pursuant to the authority vested in it by section 32, the Board of Governors of the Federal Reserve System hereby permits the following relationships:[3]

Any officer, director, or employee of any corporation or unincorporated association, any partner or employee of any partnership, or any individual, not engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of any stocks, bonds, or other similar securities except bonds, notes, certificates of indebtedness, and Treasury bills of the United States, obligations fully guaranteed both as to principal and interest by the United States, debentures issued by Federal Intermediate Credit banks, bonds issued by Federal Land banks, and general obligations of Territories, dependencies and insular possessions of the United States, may be at the same time an officer, director, or employee of any member bank of the Federal Reserve System, except when otherwise prohibited.[4]

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flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation of stocks, bonds, or other similar securities, (2) who is not a partner or employee of a partnership primarily so engaged, and (3) who is not, in his individual capacity, primarily so engaged.

A broker who is engaged solely in executing orders for the purchase and sale of securities on behalf of others in the open market is not engaged in the business referred to in section 32.

[3] Under section 32, as amended effective January 1, 1936, the Board is authorized to except limited classes of relationships from the prohibitions of the statute, under certain conditions; but the Board can make such exceptions only by general regulations and is not authorized to issue individual permits.

[4] Section 8 of the Clayton Act is applicable in certain circumstances to interlocking relationships between member banks and private bankers, and other banks, banking associations, savings banks and trust companies. See Regulation L of the Board of Governors of the Federal Reseve System.

Section 17(e) of the Public Utility Act of 1935 is applicable in certain circumstances to interlocking relationships between banks and private bankers (and corporations owned by banks and private bankers), and public utility companies and public utility holding companies. Inquiries regarding this section should be addressed to the Securities and Exchange

Section 3. Amendments

The right to alter, amend, or repeal this regulation, in whole or in part, is expressly reserved.

Statutory Provisions

Section 32 of the Banking Act of 1933 (U. S. C., Title 12, sec. 78), as amended by section 307 of the Banking Act of 1935, effective January 1, 1936, reads as follows:

> Sec. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual (primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities), shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

Commission and not to the Board of Governors of the Federal Reserve System.

Section 305(b) of the Federal Power Act is applicable in certain circumstances to interlocking relationships between public utility companies and banks and bankers that are authorized by law to underwrite or participate in the marketing of securities of a public utility. Inquiries regarding this section should be addressed to the Federal Power Commission and not to the Board of Governors of the Federal Reserve System.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1946.

Board of Governors of the Federal Reserve System et al., Petitioners,
v.
John Agnew, F. O. Fayerweather.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 6, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, here on certiorari to the Court of Appeals of the District of Columbia, presents important problems under § 30 and § 32 of the Banking Act of 1933, 48 Stat. 162, 183, as amended, 49 Stat. 704, 709, 12 U. S. C. §§ 77, 78.

Section 30 of the Act provides that the Comptroller of the Currency, whenever he is of the opinion that a director or officer of a national bank has violated any law relating to the bank, shall warn him to discontinue the violation and, if the violation continues, may certify the facts to the Board of Governors of the Federal Reserve System. The Board is granted power to order that the director or officer be removed from office if it finds after notice and a reasonable opportunity to be heard that he has continued to violate the law.[1]

[1] Section 30 also provides:
"That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court."

Section 32 of the Act prohibits, *inter alia*, any partner or employee of any partnership "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" from serving at the same time as an officer, director, or employee of a member bank.[2]

Pursuant to the procedure outlined in § 30 the Board ordered respondents removed from office as directors of the Paterson National Bank on the ground that they were employees of a firm "primarily engaged" in underwriting within the meaning of § 32. Respondents brought suit in the District Court for the District of Columbia to review the action of the Board or to enjoin its action. The District Court dismissed the complaint. The Court of Appeals reversed by a divided vote, holding that the Board exceeded its authority and that an injunction should issue. 153 F. 2d 785.

First. The Board contends that the removal orders of the Board made under § 30 are not subject to judicial review in the absence of a charge of fraud. It relies on the absence of an express right of review and on the nature of the federal bank supervisory scheme of which § 30 is an integral part. Cf. *Adams* v. *Nagle*, 303 U. S. 532; *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297; *Estep* v. *United States*, 327 U. S. 114. A majority of the Court, however, is of the opinion that the determination of the extent of the authority granted the Board to issue removal orders under § 30 of the Act is subject to judicial review and that the District Court is authorized to enjoin the

[2] Not material here is an exception "in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." § 32.

removal if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620; *Stark* v. *Wickard*, 321 U. S. 288, 309–310. That being decided, it seems plain that the claim to the office of director is such a personal one as warrants judicial consideration of the controversy. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Stark* v. *Wickard*, *supra*, p. 305.

Second. We come then to the merits. Respondents for a number of years have been directors of the Paterson National Bank, a national banking association and a member of the Federal Reserve System. Since 1941 they have been employed by Eastman, Dillon & Co., a partnership, which holds itself out as being "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." During the fiscal year ending February 28, 1943, its gross income from the underwriting field [3] was 26 per cent of its gross income from all sources, while its gross income from the brokerage business was 42 per cent of its gross income from all sources. The same percentages for the fiscal year ending February 29, 1944, were 32 per cent and 47 per cent respectively; and for the period from March 1, 1944, to July 31, 1944, 39 per cent and 40 per cent respectively. Of the total number of transactions, as well as the total market value of the securities bought and sold by the firm as broker and as dealer for an indefinite period prior to September 20, 1943, about 15 per cent were in the underwriting field. The firm is active in the underwriting field, getting what business it can. In 1943 it ranked ninth among 94 leading investment bankers in the country with respect to its total participations in

[3] The issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities. The firm does not deal in United States Government bonds.

underwritings of bonds. For a time during 1943 it ranked first among the underwriters of the country. Apart from municipals and rails, its participation in underwritings during 1943 amounted to $14,657,000. Since October, 1941, respondents have done no business with the bank other than a strictly commission business with its customers. Nor has the firm done business with the bank since the fall of 1941.

These are the essential facts found by the Board.

On the basis of these facts the Board concluded that during the times relevant here Eastman, Dillon & Co. was "primarily engaged" in the underwriting business and that respondents, being employees of the firm, were disqualified from serving as directors of the bank.

The Court of Appeals concluded that when applied to a single subject "primary" means first, chief, or principal; that a firm is not "primarily engaged" in underwriting when underwriting is not by any standard its chief or principal business. Since this firm's underwriting business did not by any quantitative test exceed 50 per cent of its total business, the court held that it was not "primarily engaged" in the underwriting business within the meaning of § 32 of the Act.

We take a different view. It is true that primary" when applied to a single subject often means first, chief, or principal. But that is not always the case. For other accepted and common meanings of "primarily" are "essentially" (Oxford English Dictionary) or "fundamentally" (Webster's New International). An activity or function may be "primary" in that sense if it is substantial. If the underwriting business of a firm is substantial, the firm is engaged in the underwriting business in a primary way though by any quantitative test underwriting may not be its chief or principal activity. On the facts in this record we would find it hard to say that underwriting was not one primary activity of the firm and brokerage another. If

"primarily" is not used in the sense we suggest then the firm is not "primarily engaged" in any line of business though it specializes in at least two and does a substantial amount of each. One might as well say that a professional man is not "primarily engaged" in his profession though he holds himself out to serve all comers and devotes substantial time to the practice but makes the greater share of his income on the stock market.

That is the construction given the Act by the Board. And it is, we think, not only permissible but also more consonant with the legislative purpose than the construction which the Court of Appeals adopted. Firms which do underwriting also engage in numerous other activities. The Board indeed observed that if one was not "primarily engaged" in underwriting unless by some quantitative test it was his principal activity, then § 32 would apply to no one. Moreover, the evil at which the section was aimed is not one likely to emerge only when the firm with which a bank director is connected has an underwriting business which exceeds 50 per cent of its total business. Section 32 is directed to the probability or likelihood, based on the experience of the 1920's, that a bank director interested in the underwriting business may use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take. That likelihood or probability does not depend on whether the firm's underwriting business exceeds 50 per cent of its total business. It might, of course, exist whatever the proportion of the underwriting business. But Congress did not go the whole way; it drew the line where the need was thought to be the greatest. And the line between substantial and unsubstantial seems to us to be the one indicated by the words "primarily engaged".

There is other intrinsic evidence in the Banking Act of 1933 to support our conclusion. Section 20 of the Act

outlaws affiliation [4] of a member bank with an organization "engaged principally" in the underwriting business. Section 19 provides control over bank holding companies. In order to vote its stock in controlled banks a bank holding company must show that it does not own, control, or have any interest in, and is not participating in the management or direction of any organization "engaged principally" in the underwriting business. On the other hand, when Congress came to deal with the practice of underwriters taking checking deposits, it used language different from what it used either in §§ 19 and 20 on the one hand or in § 32 on the other. By § 21 it prohibited any organization "engaged" in the underwriting business "to engage at the same time to any extent whatever" in the business of receiving checking deposits. Thus within the same Act we find Congress dealing with several types of underwriting firms—those "engaged" in underwriting, those "primarily engaged" in underwriting, those "engaged principally" in underwriting. The inference seems reasonable to us that Congress by the words it chose marked a distinction which we should not obliterate by reading "primarily" to mean "principally".

The Court of Appeals laid some stress on the fact that Congress did not abolish the bank affiliate system but only those underwriter affiliates which were under the control of a member bank or which were under a common control with it.[5] Section 20. Since Congress made majority control critical under § 20, it was thought that under § 32 a firm was not "primarily engaged" in underwriting unless underwriting constituted a majority of its business. But the two situations are not comparable. In § 32 Con-

[4] Defined in § 2 (b) as direct or indirect ownership or control of more than 50 per cent of the voting stock of the organization in question, common ownership or control of 50 per cent or more of such voting stock, or a majority of common directors.

[5] See note 4, *supra*.

gress was not dealing with the problem of control of underwriters by banks or *vice versa*. The prohibited nexus is in no way dependent on the presence or absence of control, nor would it be made so even if "primarily engaged" in underwriting were construed to mean principally engaged in that business. Section 32 was designed, as we have said, to remove tempting opportunities from the management and personnel of member banks. In no realistic sense do those opportunities disappear merely because the underwriting activities of the outside firm with which the officer, director, or employee is connected happens to fall below 51 per cent. Fifty-one per cent, which is relevant in terms of control, is irrelevant here. The fact then that Congress did not abolish underwriter affiliates serves as no guide in determining whether "primarily engaged" in underwriting as used in § 32 means principally engaged or substantially engaged in that business.

Section 32 is not concerned, of course, with any showing that the director in question has in fact been derelict in his duties or has in any way breached his fiduciary obligation to the bank. It is a preventive or prophylactic measure. The fact that respondents have been scrupulous in their relationships to the bank is therefore immaterial.

There is a suggestion that if "primarily" does not mean principally but merely connotes substantiality, § 32 constitutes an unlawful delegation of authority to the Board. But we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 397–400; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 142–146; *Yakus* v. *United States*, 321 U. S. 414, 424–428; *Bowles* v. *Willingham*, 321 U. S. 503, 512–516.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1946.

Board of Governors of the Federal Reserve System et al., Petitioners, v. John Agnew, P. O. Fayerweather.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 6, 1947.]

Mr. Justice Rutledge, concurring.

If the question presented on the merits is reviewable judicially, in my opinion it is only for abuse of discretion by the Board of Governors. Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it. Accordingly their judgment in such matters should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority.

In this case I cannot say that either of these things has occurred. The Board made its determination after the required statutory hearing on notice. 48 Stat. 162, 193, 12 U. S. C. § 77. The consideration given was full and thorough, including detailed findings of fact and conclu-

sions of law, followed by a carefully written opinion.[1] The Board concluded that "primarily" in § 32 does not mean "first in volume in comparison with any other business or businesses in which it [the employer] engages,"[2] but means rather as "a matter of primary importance," like "primary" colors or planets or as the word is used in the phrase "the primary causes of a war." This view it found not only supported by accepted dictionary meaning but also in conformity with Congress' intent as established by the legislative history. In a further ground which we must take as reflecting its specialized experience, the Board stated: "To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one."

I cannot say that the Board's conclusion, in the light of those groundings, is wanting either for warrant in law or for reasonable basis in fact. The considerations stated in the Court's opinion and in the dissenting opinion filed in the Court of Appeals, 153 F. 2d 785, 795, as well as by the Board itself, confirm this view. I think it important, not only for this case but for like ones which may arise in the future, perhaps as a result of this decision, to make clear that my concurrence in the Court's disposition of the case

[1] The opinion is not reported, pursuant to the statutory prohibition, 12 U. S. C. § 77, which is effective except in connection with proceedings for enforcement.

[2] Under such a view, in cases involving different facts the question would become judicial whether "primarily" means more than half of (1) the gross volume of business done; (2) the gross profit; (3) the net profit, where some but not all these factors as relating to one phase of the total activities carried on amounts to more than half the gross. Such discriminations would seem to be clearly within the Board's power to determine in the first instance. If so, it is difficult to see why that power does not include the determination made here.

is based upon the ground I have set forth, and not upon independent judicial determination of the question presented on the merits. I do not think this Court or any other should undertake to reconsider, as an independent judgment, the Board's determination upon that question or similar ones likely to arise, if the Board was not without basis in fact for its judgment and does not clearly transgress a statutory mandate. More than has been shown here would be required to cause me to believe that the Board has exceeded its power in either respect.

MR. JUSTICE FRANKFURTER joins in this opinion.